



In the Matter of:

**HANFORD ATOMIC METAL
TRADES COUNCIL**

ARB CASE NO. 98-138

DATE: September 23, 1998

***In Re:* Wage Determination for Project
W-211, The Department of Energy
Operations Office, Richland, WA.**

ORDER

This case is before the Board pursuant to the Davis-Bacon Act, 40 U.S.C. §276a *et seq.* (1994) (DBA), and the regulations at 29 C.F.R. Parts 5 and 7 (1998). In response to the Petition for Review filed by Hanford Atomic Metal Trades Council (HAMTC), the Acting Administrator of the Wage and Hour Division, United States Department of Labor, has filed a Motion to Dismiss for Lack of Ripeness and to Suspend the Briefing Schedule. The Acting Administrator argues that the Board has no jurisdiction and should dismiss the case without prejudice because Wage and Hour has not issued a final agency decision as required under 29 C.F.R. §7.9(a). The Acting Administrator adds, however, that Wage and Hour is willing to treat the petition as a request for reconsideration and will, pursuant to 29 C.F.R. §5.13, issue a final ruling on the issues raised by HAMTC. HAMTC opposes the Acting Administrator's motion, arguing that Wage and Hour issued a final determination on June 26, 1998.

Documents that have been submitted to the Board show that on April 20, 1998, HAMTC filed with the Acting Administrator a "Petition for Review of Coverage Determination of the Department of Energy [DOE], Richland Operations Office, Richland, Washington, Regarding Project No. W-211." HAMTC challenged DOE's decision that the entirety of Project W-211, which involves storing and treating radioactive waste at its Hanford site in Washington state, is covered by the Davis-Bacon Act. HAMTC asked that the Administrator issue an "appropriate ruling or interpretation" in accordance with 29 C.F.R. §5.13, reversing DOE's coverage determination as it pertains to the non-construction portions of the project and requiring DOE to segregate the non-construction components of Project W-211 from its construction components.

By letter dated June 26, 1998, Ethel P. Miller of the Office of Enforcement Policy in the Wage and Hour Division responded to HAMTC's request for review. She viewed the issue presented as whether the McNamara-O'Hara Service Contract Act, 41 U.S.C. §351 *et seq.* (1994), applies to the non-construction aspects of the project and determined that because the principal purpose of the project is for construction, the project is subject only to the requirements

of the DBA. In conclusion, Ms. Miller advised HAMTC to contact her if it needed further assistance.

HAMTC then filed the instant Petition for Review with the Board, and in response the Acting Administrator filed this motion to dismiss for lack of ripeness.

DISCUSSION

The Department of Labor's regulation at 29 C.F.R. §7.9 provides:

Any party or aggrieved person shall have the right to file a petition for review with the Board . . . within a reasonable time from any final decision in any agency action under part 1, 3, or 5 of this subtitle.

In pertinent part the regulation at 29 C.F.R. §5.13 provides:

All questions relating to the application and interpretation of . . . labor standards provisions . . . shall be referred to the Administrator for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947.^{1/} Requests for such rulings and interpretations should be addressed to the Administrator, Wage and Hour Division

The Acting Administrator argues that the national office of the Wage and Hour Division, which has the authority to issue final rulings, does not consider the June 26 letter by Ms. Miller to be a final, appealable ruling under Sections 5.13 and 7.9. In support, the Acting Administrator attached to his motion an affidavit in which Ms. Miller declares that she has not been delegated authority to issue final rulings under Section 5.13. The Acting Administrator also points out that Ms. Miller welcomed any request for assistance from HAMTC and did not state that no further review was available.

HAMTC responds that it requested a ruling or interpretation from the Administrator as provided in Section 5.13, and Ms. Miller issued a reply containing all the indicia of finality. Citing the Board's decision in *Diversified Collection Servs.*, ARB Case No. 98-062, May 8, 1998, HAMTC argues that under these circumstances Ms. Miller's determination letter must be regarded as the final decision of the Wage and Hour Division. In addition, HAMTC cites *Western Illinois Home Health Care, Inc. v. Herman*, No. 97-1587, 1998 WL 375536 (7th Cir. Jul. 7, 1998), in support of its position that Ms. Miller's response was not tentative but rather was a declarative reply which should be considered a final agency decision.

^{1/} Section 10 of the Portal-to-Portal Act provides that no employer shall be subject to any liability or punishment for certain acts or omissions which it pleads and proves were "in good faith in conformity with and in reliance on any written administrative . . . interpretation" of the agency. 29 U.S.C. §259 (a).

It is not surprising that HAMTC viewed Ms. Miller's letter as a final, appealable ruling. HAMTC acted in accordance with Section 5.13 by addressing a request for a ruling or interpretation regarding the coverage issue directly to the Administrator. Section 5.13 specifically states that the ruling or interpretation issued in response to such a request shall be "authoritative." Even if Ms. Miller misunderstood HAMTC's complete legal argument, as HAMTC alleges in its petition, Ms. Miller issued a definitive opinion that the DBA, exclusively, applies to the project, and HAMTC should not be obliged to request yet another "ruling or interpretation." There is nothing in the regulation to indicate that HAMTC, if dissatisfied, should have sought further review within the Wage and Hour Division before filing a petition for review with the Board. As the Acting Administrator states, "Ms. Miller's letter did not clearly and unambiguously suggest that . . . further review within Wage and Hour was neither available nor required." More importantly, however, the letter did not explain that the ruling was subject to further review by the Wage and Hour Division. As we stated in *Diversified*, "[i]f the Acting Administrator intends to create multiple levels of review within the Wage and Hour Division prior to issuing a 'final' decision, it would be prudent to acknowledge such levels of review clearly so that the parties and this Board will be able to distinguish a preliminary decision from a final decision." See also *Swetman Security Serv., Inc.*, ARB Case No. 98-105, Order, Jul. 23, 1998, slip op at 3.

In view of the Acting Administrator's position, however, that he is willing to treat this petition as a request for reconsideration, we will dismiss the case without prejudice and remand it to the Wage and Hour Division for consideration and issuance of a final and appealable ruling within **thirty (30) days** of today's date. The Acting Administrator's motion to suspend the briefing schedule is granted.

SO ORDERED.

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member